IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-891

FRANK S. BEAL, Secretary of Welfare of the Commonwealth of Pennsylvania, ROBERT P. KANE, Attorney General of the Commonwealth of Pennsylvania, THE COMMONWEALTH OF PENNSYLVANIA, and F. EMMETT FITZPATRICK,

Appellants,

—v.—

JOHN FRANKLIN, M.D. and OBSTETRICAL SOCIETY OF PHILADELPHIA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR *AMICI CURIAE* THE AMERICAN PUBLIC HEALTH ASSOCIATION THE AMERICAN CIVIL LIBERTIES UNION THE PENNSYLVANIA CIVIL LIBERTIES UNION THE WOMEN'S LAW PROJECT

(Additional *Amici* Appear Inside)

BURT NEUBORNE
JUDITH LEVIN
SYLVIA LAW
c/o American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

Counsel for Amici Curiae

INDIVIDUAL AMICI:*

Ralph C. Benson, M.D.
Professor and Chairman
Department of Obstetrics & Gynecology
University of Oregon, Health Sciences Center
Portland, OR 97201

Robert W. Berliner, M.D., Dean
Yale University School of Medicine
333 Cedar Street
New Haven, CT 06510

Ronald Berman, M.D.
Kapiolani Hospital
1319 Punahou Street
Honolulu, HI 96814

Daniel K. Bloomfield, M.D., Dean
Schools of Basic Medical and Clinical Sciences
University of Illinois, College of Medicine
Urbana-Champaign, IL 61801

Frederick J. Bonte, M.D., Dean
The University of Texas
Southwestern Medical School at Dallas
5323 Harry Hines Boulevard
Dallas, TX 75235

C.D. Christian, M.D.
Professor and Head, Obstetrics & Gynecology
Arizona Medical Center
Tucson, AZ 85724

---

* Titles and affiliations of all individuals appearing herein as amici are provided for identification purposes only.

INDIVIDUAL AMICI (Continued)

Robert D. Coye, M.D., Dean
Wayne State University
School of Medicine
540 East Canfield
Detroit, MI 48201

Morton C. Creditor, M.D., Associate Dean
Schools of Basic Medical Sciences and
Clinical Medicine -- UC
University of Illinois
190 Medical Sciences Building
Urbana, IL 61801

Preston V. Dilts, Jr., M.D.
Professor and Chairman
OB-GYN Department
University of Tennessee
894 Madison Avenue
Memphis, TN 38163

Leo J. Dunn, M.D.
Professor and Chairman
Department of Obstetrics & Gynecology
Medical College of Virginia
Virginia Commonwealth University
1200 E. Broad Street
Richmond, VA 23298

Robert H. Ebert, M.D.
Dean of the Faculty of Medicine
Harvard Medical School
25 Shattuck Street
Boston, MA 02115

INDIVIDUAL AMICI (Continued)

Keneth Edelin, M.D.
Professor and Acting Chairman
Department of OB-GYN
Boston University School of Medicine
80 E. Concord Street
Boston, MA 02118

Charles E. Flowers, Jr., M.D.
Professor and Chairman
Department of Obstetrics & Gynecology
University of Alabama in Birmingham
University Station
Birmingham, AL 35294

Henry W. Foster, Jr., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Meharry Medical College
1005 18th Avenue North
Nashville, TN 37208

Fritz Fuchs, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Cornell University Medical College
530 East 70th Street
New York, NY 10021

John W. Greene, Jr., M.D.
Professor and Chairman
University of Kentucky Medical Center
800 Rose Street
Lexington, KY 40506

INDIVIDUAL AMICI (Continued)

S.B. Gusberg, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Mount Sinai School of Medicine
of the City University of New York
1176 Fifth Avenue
New York, NY 10029

Arthur L. Haskins, M.D.
Professor, OB-GYN
University of Maryland Hospital
Baltimore, MD 21201

T. Terry Hayashi, M.D.
Professor and Chairman of OB-GYN
University of Pittsburgh School of Medicine
Pittsburgh, PA 15213
(Magee-Women's Hospital, Pittsburgh, PA 15213)

Charles H. Hendricks, M.D.
Professor and Chairman,
Obstetrics and Gynecology
University of North Carolina
Chapel Hill, NC 27514

Lawrence L. Hester, Jr., M.D.
Professor and Chairman
Department of OB-GYN
Medical University of South Carolina
80 Barre Street
Charleston, SC 29401

Jane Hodgson, M.D.
Associate Professor of Obstetrics & Gynecology
University of Minnesota Medical School
St. Paul-Ramsey Hospital
St. Paul, MN 55101

INDIVIDUAL AMICI (Continued)

Irwin H. Kaiser, M.D.
Professor-Director
Department of Obstetrics and Gynecology
The Hospital of Albert Einstein College
of Medicine
1825 Eastchester Road
Bronx, NY 10461

Nathan G. Kase, M.D.
Professor and Chairman
Department of Obstetrics & Gynecology
Yale University School of Medicine
333 Cedar Street
New Haven, CT 06510

Raymond H. Kaufman, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Baylor College of Medicine
Houston, TX 77030

William Keettel, M.D.
Professor and Head
Department of OB-GYN
University of Iowa Medical School
Iowa City, IA 52240

Thomas H. Kirschbaum, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
178 Giltner Hall
Michigan State University
East Lansing, MI 48824

INDIVIDUAL AMICI (Continued)

Schuyler G. Kohl, M.D.
Professor and Acting Chairman
Department of Obstetrics & Gynecology
Downstate Medical Center
450 Clarkson Avenue
Brooklyn, NY 11203

Kermit E. Krantz, M.D., Litt. D.
Professor and Chairman
Department of Gynecology and Obstetrics
Professor of Anatomy
Associate to the Executive Vice-Chancellor
for Facilities Development
University of Kansas Medical Center
Rainbow Boulevard at 39th Street
Kansas City, KS 66103

James H. Lee, Jr., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Jefferson Medical College
1025 Walnut Street
Philadelphia, PA 19107

Dr. William H. McBeath
Executive Director
American Public Health Association
1015 18th Street, S.W.
Washington, DC 20036

Sherman M. Mellinkoff, M.D.
Professor of Medicine and Dean
UCLA School of Medicine
Los Angeles, CA 90024

INDIVIDUAL AMICI (Continued)

James A. Merrill, M.D.
Professor and Head
Gynecology and Obstetrics
University of Oklahoma
800 N.E. 13th
Oklahoma City, OK 73190

Robert E. L. Nesbitt, Jr., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
State University of New York
Upstate Medical Center
Syracuse, NY 13210

Kenneth R. Niswander, M.D.
Professor and Chairman, OB/GYN
University of California at Davis
4301 "X" Street
Sacramento, CA 95817

Roy T. Parker, M.D.
F.B. Carter Professor & Chairman
Department of Obstetrics & Gynecology
Duke University Medical Center
Box 3097
Durham, NC 27710

Ronald J. Pion, M.D.
Clinical Professor
Department of OB-GYN
John A. Burns School of Medicine
University of Hawaii
1319 Punahou Street
Honolulu, HI 96814

INDIVIDUAL AMICI (Continued)

L.C. Powell, Jr., M.D.
Professor, Department of OB-GYN
University of Texas Medical Branch
Galveston, TX 77550

Seymour L. Romney, M.D.
Professor
Department of Obstetrics and Gynecology
Albert Einstein College of Medicine
1300 Morris Park Avenue
Bronx, NY 10461

Kenneth J. Ryan, M.D.
Kate Macy Ladd Professor of OB-GYN
Chairman of the Department
Harvard Medical School
Chief of Staff, Boston Hospital for Women
221 Longwood Avenue
Boston, MA 02115

Harold Schulman, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Albert Einstein College of Medicine and
affiliated hospitals
Bronx, NY 10461

INDIVIDUAL AMICI (Continued)

Robert J. Slater, M.D., F.R.C.P.(C), F.A.A.P.
AAPFRCP(C)
310 East 46th Street
New York, NY 10017
Past President, Medical College of Pennsylvania
Past President, Foundation for Child
Development, New York

Robert C. Stepto, M.D.
Chairman, Professor
Mt. Sinai Hospital & Medical Center
15th & California Avenue
Chicago, IL 60608

Donald P. Swartz, M.D.
Professor and Chairman
Department of OB/GYN (Albany Medical College)
Obstetrician/Gynecologist In Chief (Albany
Medical Center Hospital)
Albany Medical College
Albany, NY 12208

Francis Terada, M.D.
Clinical Professor OB-GYN, University of
Hawaii, School of Medicine
Chief of Staff, Kapiolani-Children's Medical
Center
1319 Punahou Street
Honolulu, HI 96814

INDIVIDUAL AMICI (Continued)

W. Norman Thornton, Jr., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Virginia School of Medicine
Charlottesville, VA 22901

Julia J. Tsuli, M.D.
Associate Professor of OB/GYN
University of Hawaii
School of Medicine
1319 Punahou Street
Honolulu, HI 96814

James C. Warren, M.D., Ph.D.
Professor and Head
Department of Obstetrics and Gynecology
Professor of Biological Chemistry
Obstetrician-Gynecologist-in-Chief,
Barnes and Allied Hospitals
4911 Barnes Hospital Plaza
St. Louis, MO 63110

Allan B. Weingold, M.D.
Professor & Chairman
Department of Obstetrics & Gynecology
George Washington University
2150 Pennsylvania Avenue, N.W.
Washington, DC 20037

W. Donald Weston, M.D., Dean
College of Human Medicine
A-118 East Fee Hall
Michigan State University
East Lansing, MI 48824

INDIVIDUAL AMICI (Continued)

Ralph M. Wynn, M.D.
Professor and Head
Department of Obstetrics & Gynecology
ALSM, University of Illinois
840 South Wood Street
Chicago, IL 60612

J[illegible]n S. Zelenik, M.D.
Professor of Obstetrics and Gynecology
Vanderbilt University School of Medicine
Nashville, TN 37232

Frederick P. Zuspan, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
The Ohio State University
410 West 10th Avenue
Columbus, OH 43210

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FRANK S. BEAL, et al.,

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JOHN FRANKLIN, M.D., and OBSTETRICAL SOCIETY OF PHILADELPHIA,

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On Appeal From the United States District Court for the Eastern District of Pennsylvania

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BRIEF FOR THE AMERICAN PUBLIC HEALTH ASSOCIATION, THE AMERICAN CIVIL LIBERTIES UNION, THE PENNSYLVANIA CIVIL LIBERTIES UNION, AND THE WOMEN'S LAW PROJECT AMICI CURIAE

INTEREST OF AMICI*

The American Public Health Association (APHA) is a national non-governmental organization established in 1872. Its objective is

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* Amici have obtained permission to file this brief from counsel for both parties. The letters of consent are on file with the Clerk of the Court.

to protect and promote personal and environmental health. With a membership of over 50,000 health professionals including fifty-one affiliated organizations, it is the largest public health organization in the world. The APHA's primary purpose is to develop a national health policy to provide equitable, low-cost, quality health care for all citizens.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 200,000 members dedicated to defending the principles embodied in the Bill of Rights to the Constitution. The Pennsylvania Civil Liberties Union is the state affiliate of the ACLU operating in Pennsylvania. In the furtherance of its strong interest in preserving the fundamental right to privacy and reproductive freedom, the ACLU has established a Reproductive Freedom Project.

The Women's Law Project is a non-profit feminist legal organization in Philadelphia, Pennsylvania working for the legal equality and reproductive freedom of women through litigation, public education and research.

Attorneys affiliated with the American Civil Liberties Union represented appellants in Doe v. Bolton, 410 U.S. 179 (1973) and appellees in United States v. Vuitch, 402 U.S. 62 (1971) and Poelker v. Doe, 432 U.S. 519 (1977). The ACLU and its affiliates have also appeared amici on other important reproductive freedom cases in this Court including Baird v. Bellotti, 428 U.S. 132 (1976) and Beal v. Doe, 432 U.S. 464 (1977), the latter with the American Public Health Association.

Amici have a strong interest in the issues presented by this case. They believe that the integrity of doctors' independence in treating the reproductive health needs of their patients is at stake here and that women who cannot rely on their physicians' independent medical judgments in treating them are effectively denied their constitutional rights to reproductive freedom.

SUMMARY OF ARGUMENT

In Roe v. Wade, 410 U.S. 113 (1973), this Court identified fetal viability as a critical point on the biological and philosophical continuum and invested it with legal significance. The viability of a given fetus is, however, merely a predictive medical judgment over which reasonable doctors may, and often do, differ. Since a doctor's medical judgment as to viability carries with it grave legal consequences, amici are deeply concerned with the procedures utilized by the state to attempt to influence both the doctor's decision as to viability and medical techniques predicated upon that decision. Amici believe that in order to assure the integrity of the tri-partite analysis suggested in Roe v. Wade, the decision as to fetal viability must be left to the good faith medical judgment of an attending physician. Accordingly, Pennsylvania's attempt to influence that decision by threatening a physician with criminal punishment under vague and amorphous standards if he or she "wrongly"

diagnoses a fetus as non-viable and utilizes medical techniques consistent with that diagnosis is fundamentally at odds with rights delineated in Roe. It is, amici believe, doctors, not prosecutors, who must identify the amorphous point on the biological and philosophical continuum when viability has been attained. Moreover, such a medical decision, fraught with uncertainty, must be insulated from attempts by the state to prevent a doctor from the good faith exercise of considered medical judgment on the question of viability.

ARGUMENT

I SECTION 5(A), IN SUBJECTING DOCTORS TO POSSIBLE CRIMINAL SANCTION FOR ABORTING "MAY BE VIABLE" FETUSES, IS UNCONSTITUTIONALLY VAGUE.

A. The Governing Law

In Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973), this Court

established a now familiar three stage anaylsis governing the state's right to regulate the decision by a woman to seek -- and the decision by a doctor to perform -- an abortion. During the stage prior to approximately the end of the first trimester of pregnancy, the decision to seek an abortion -- and the doctor's decision to perform an abortion -- are wholly outside the regulatory power of the state.[1] During the first trimester, the wishes of the patient and the medical judgment of the attending physician are the sole operative factors. During the stage subsequent to the

[1] The state's interest is confined to assuring the competence of the physician, Roe v. Wade, supra, at 165, and assuring an informed consent to the abortion by the patients. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 (1976). The state cannot require that a first trimester abortion be performed in a hospital, Doe v. Bolton, supra, at 195, or advance approval by a hospital committee, Id. at 195-198, or certificate of two physicians Id. at 199, or consent of a spouse or parent, Planned Parenthood of Central Missouri v. Danforth, supra, at 69, 74.

end of the first trimester but prior to viability, the state may regulate the doctor-patient relationship only to promote the health of the patient. However, such health-related regulations during the previability stage may not unduly interfere with a woman's right to seek a second trimester abortion or with a doctor's obligation to use his or her best medical judgment in determining the medical procedures to be utilized in performing the abortion.[2] Once the fetus has attained viability, the state may, if it chooses, regulate and even proscribe abortion unless, in the good faith exercise of medical judgment, an attending physician deems abortion necessary for the preservation of the life or health of the patient. Thus, even during the post-viability stage, the medical judgment of the attending physician remains the dominant

[2] Roe v. Wade, supra, at 163. In Planned Parenthood of Central Missouri v. Danforth, supra, this Court held unconstitutional a statutory prohibition of saline abortion procedures, finding that it "fail[ed] as a reasonable regulation for the protection of maternal health." Id. at 78.

factor in determining the propriety of and the technique of an abortion. Subject to a medical override where necessary to protect the life or health of the woman, the state's interest in protecting potential life justifies state regulations during the post-viability stage which would never be tolerated in a pre-viability setting.

In Roe, this Court sought to define viability as a medical event which generally occurs between the 24th and the 28th week of pregnancy.[3] In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 63-65, (1976), this Court rejected arguments aimed at translating viability into a legal concept of fixed and universal meaning and, instead, reinforced the role of medical judgment in determining the differing points on a con-

[3] In Roe the Court reviewed the history and different philosophical approaches to the issue of viability, and concluded that a viable fetus is one which is "potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. [footnote omitted]" 410 U.S. 113, 160 (1973).

tinuum when viability has been attained.[4] As currently understood by the medical profession, viability is a predictive concept based upon a number of factors calling for the exercise of a doctor's medical judgment. Under current practice, a doctor seeking to determine viability must estimate the gestational age and probable weight of the fetus and, comparing the estimated gestational age and weight with empirical observation records of the survival history of similar fetuses, estimate the likelihood of fetal survival. When such an estimate of possible survival reaches an arbitrary probability level the fetus is deemed medically viable. Such a medical judgment as to viability is subject to at least four variables rendering it inexact in the extreme. First, a doctor's judgment as to gestational age is based upon the menstrual history of the patient

[4] The definition of viability adopted by Missouri in and upheld by this Court in Danforth set viability at "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems," 428 U.S. at 63-64. In Danforth, this Court stressed, noting the parties' agreement, that the determination as to viability "rests with the physician in the exercise of his professional judgment." Id., at 65, n.4.

- a notoriously inexact measuring device.[5] Second, a doctor's judgment as to fetal weight is based on a necessarily inexact estimate of the size and condition of the patient's uterus.[6] Third, the predictive value of the empirical observations on which the judgment is ultimately based is itself open to serious question because of the relatively small statistical sample and the existence of variables which render the prediction highly problematic.[7] Finally, the appropriate level of probablity of survival is itself a subject of substantial disagreement.[8]

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5 National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, United States Department of Health, Education and Welfare, Research on the Fetus, 1975, pp. 11-13; L. Hellman & J. Pritchard, Williams Obstetrics, 199 (14th ed. 1971).

6 L. Hellman & J. Pritchard, op. cit., 238. See also: Brenner, Edelman & Hendricks, A Standard of Fetal Growth for the United States of America, 126 American Journal of Obstetrics and Gynecology 555 (Nov. 1, 1976).

7 Id.

8 There is no standard probability level for survival of the fetus which is accepted throughout the medical community. As testimony at trial indicated, each doctor sets his or her [Footnote continued]

B. The Issue in this Case

In the service of its interest in the potential life of the viable fetus, Pennsylvania enacted § 5(a) which provides:

> Section 5. Protection of Life of Fetus
>
> (a) Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise the degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to

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[Footnote 8 continued]
own level of fetal viability. Dr. Gerstly testified that a twenty-four week fetus has 2-5% chance of survival. (8a-9a) Dr. Franklin labeled viability the 10% chance of fetal survival at twenty-eight weeks. (180a; 20a). Dr. Keenan testified that a twenty-six week fetus has a 10-30% chance of survival (92a-93a). The probability of a fetal survival necessary to find viability ranged from 2% to 30%.

Also, all of the doctors testified to a margin of error of at least two to four weeks in determining gestational age. Such error is obviously critical to the predictions of fetal survival.

> exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother. [Emphasis supplied][9]

The issue posed by this case is not whether viability is an appropriate standard. Rather, it is who is to decide whether a given fetus has attained viability -- the attending physician in the good faith exercise of his or her medical judgment or a prosecutor and jury in the course of a criminal proceeding. Given the significance of viability as a mixed medico-legal concept, what constraints may Pennsylvania impose upon the free exercise of medical judgment by a physician called upon to determine viability? More precisely, to what extent may Pennsylvania erect a criminal procedure to second-guess a physician who has reached a medical judgment that a fetus is not viable and has proceeded to abort it on that assumption?

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[9] Section 5(d) subjects doctors to civil and criminal liability for failure to comply with Section 5(a).

Unfortunately, appellants have not addressed the issue of who decides viability, electing instead to argue a false issue not presented in this case and not opposed by amici. Appellants argue at length that the state possesses an interest in preserving the potential life of a viable fetus, and in seeking to advance that interest, may require the use of certain techniques when a viable fetus is aborted. However, in casting the argument in this form, appellants have begged the basic question by assuming that a given fetus is viable. Before one can debate the consequences of viability, one must determine who is to decide when viability has been attained and extent to which that medical decision may be second-guessed in a criminal proceeding. It is the position of amici that the good faith medical judgment of the attending physician is the sole determinant of viability and that such a good faith judgment may not constitutionally be subject to de novo review in a criminal proceeding.

C. The Pennsylvania Approach to Determining Viability

Pennsylvania recognizes, as it must, that any medical determination concerning viability late in the second trimester of pregnancy is inherently problematic. Accordingly, it

substitutes another concept - "may be viable" - and predicates its attempt to control the medical judgment of attending physicians upon it. Under the Pennsylvania statute, whenever a fetus may be viable, an attending physician is directed to use certain medical techniques to abort it, despite his or her best medical judgment that the fetus is in all likelihood not viable and despite the fact that, left to an unhampered exercise of medical judgment, the doctor would have elected a different medical technique.[10] Moreover, under the Pennsylvania statute, any doctor who reaches a good faith medical decision that a fetus is not viable after mid-pregnancy and acts

[10] The expansion effected by substituting "may be viable" for "viable" is, of course, enormous. Every diagnosis of the viability of a fetus at or shortly after mid-pregnancy involves a physician in a delicate predictive judgment based on a series of inexact factors discussed, supra, at pp. 10-11. Given the essentially statistical nature of the concept, no diagnosis involving viability is ever anything more than an educated guess. In many cases in which a doctor ventures an educated guess that the fetus is not viable, a degree of doubt exists and the fetus could arguably qualify as "may be viable." Certainly, doctors could not afford to risk a criminal prosecution based upon such a vague and all encompassing standard.

accordingly, renders himself liable to criminal prosecution at the hands of a prosecutor who may allege that the doctor erred in deciding the viability issue.[11]

There are many reasons why doctors prefer mid-trimester abortion techniques inconsistent with preservation of fetal life. Saline instillation, although usually fetal destructive, is the most frequently used and among the safest second trimester procedures.[12] On the other hand,

[11] In a particular case it may be much easier to establish that a particular fetus was, or may have been viable, after the fact of abortion than it is to estimate this fact before an abortion. After an abortion, the size of the fetus is precisely knowable, where it is not before. A post-abortion pathology report will produce further data that, for obvious reasons, is not available to the doctor making a judgment whether a pregnant woman carries a fetus which is or may be viable. All of this information, which in the nature of things is not fully available to the physician at the time when he or she must make a decision as to likely viability, will be available to the prosecutor. Under the Pennsylvania statute criminal liability can be established if the prosecutor, with the benefit of hindsight, can show only that a fetus might have been viable.

[12] Planned Parenthood of Central Missouri v. Danforth, supra at 77, W. Cates, K. Schulz, D. Grimes and C. Tyler Abortion Methods: Morbidity Costs and Emotional Impact. 1. The

(footnote 12 cont. on next page)

Prostaglandins, which preserve the fetus, are contraindicated for many women.[13] A hysterotomy although preserving the fetal life, is major surgery involving risks to a woman greater than those of salines or even prostaglandins.[14] Among other considerations, the skill of the physician is an important factor in choice of method for mid-trimester abortions. For example, while there is strong evidence that of the common second trimester methods the D&E (Dilation and Evacuation) is the safest abortion procedure, at the present time few physicians in the entire country are properly

(footnote 12 cont. from previous page)

Effect of Delay and Method of Choice on the Risk of Abortion Morbidity. 9 Family Planning Perspectives 266 (1977) (hereinafter, Cates et al., Effect of Delay)

13 For example, women with pre-existing medical conditions such as asthma, glacoma, hypertension, cardiovascular disease or epilepsy are poor prostagladin risks. Also it should not be used in the presence of acute pelvic inflamatory disease. Some women will be hypersensitive to the drug itself, Wynn v. Scott, No. 75 C-3975 (Eastern District of Illinois, April 12, 1978) (Three-Judge Court) Slip op. 63-64.

14 Cates et al., Effect of Delay at 268. Infection and hemorrhage occur in 35-45% of the cases (Tr. 73a).

trained to perform the procedure. As training and expertise increase, however, D&E will undoubtedly become a far more common method.[15] In short, amici believe that § 5(a) flies in the face of current medical knowledge on the subject of second trimester abortions by apparently mandating use of methods which are known to be the most dangerous to the woman's health. It is clear that as medical science continues to research and refine methods of performing mid-trimester abortions the gap between procedures contemplated by § 5(a) and the methods urged by doctors as the safest for their patients will grow wider rather than

15 Statement by Dr. Willard Cates, Center for Disease Control at a Conference on Alternative Procedures for Mid-Trimester Abortions as reported in Female Health Topics and Diagnostic Reporter Vol. I No. 1 (1978) at 4 col. 1. The total morbidity rate for D&E's at seventeen weeks or later is 5.38 per 100 legal abortions, compared to 35.87 for salines and 51.08 for Prostaglandins. Cates et al., Effect of Delay at 267. Another advantage of the D&E procedure is that it does not require a waiting period between the thirteenth and fifteenth weeks of gestation. Delay in obtaining the abortion has been found to be a critical factor in maternal morbidity. Cates et al., Effect of Delay, supra.

narrower.[16]

The net result of the Pennsylvania statute is to dictate the technique to be used in aborting a mid-pregnancy fetus, despite the judgment of the attending physician that the fetus is not viable and should be aborted pursuant to a different technique. Moreover, under the Pennsylvania statute, a doctor who diagnoses a mid-pregnancy fetus as non-viable

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[16] The issue of alternative procedure of second trimester abortion is currently the subject of serious debate within the medical community. In March, 1978, the American College of Obstetricians and Gynecologists and several other medical societies sponsored a conference on the issue of alternative methods of second trimester abortions at which Dr. Willard Cates, of HEW's Center for Disease Control, Bureau of Epidemiology Family Planning Evaluation noted a shift over time in methods, reflecting increased use of D&E over prostaglandins. Alternative Procedures, 1 Female Health Topics & Diagnostics Reporter, at 4, col 3. Dr. Cates suggested that the results of the latest studies conducted by CDC and the Joint Program for Study on Abortion (JPSA) challenge the wisdom of traditional practices regarding second trimester abortions. "We are calling into question the 12-week gestational age limit on abortions by uterine curettage procedures." Id., col. 4.

and utilizes an abortion technique not in favor with the local authorities, risks a criminal prosecution in which the doctor will have the impossible burden of demonstrating that the fetus was not even arguably viable.

D. Predicating Criminal Sanctions on the Fact that a Fetus "May Be Viable" is Void for Vagueness

In threatening doctors with potential criminal sanctions if they diagnose a fetus non-viable after the middle of the second trimester when a prosecutor believes that the fetus may have been viable, the Pennsylvania statute violates basic constitutional norms.

Pennsylvania predicates potential criminal sanctions on a finding that a fetus "may be viable." Were the Pennsylvania statute to predicate liability on the improper abortion of a viable fetus, serious vagueness issues would be raised by the inherently inexact nature of viability as a medical concept.[17]

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[17] The vagueness inherent in a statute predicated on viability is discussed infra at 27-29. Briefly put, amici believes that absent a requirement of scienter, doctors may not be prosecuted for aborting a fetus alleged to be viable. So long as a doctor does not intentionally and willfully violate a viability based statute, he should remain immune from prosecution. Cf. Screws v. United States,

(footnote 17 cont. on next page)

However, Pennsylvania has vastly exacerbated the vagueness problem by predicating criminal liability on the improper abortion of a fetus which "may be viable." When a concept is as devoid of objective meaning as "may be viable," it cannot serve as the standard for imposing criminal liability.

This Court has recognized three basic policies which are served by the void-for-vagueness doctrine. First, vague criminal statutes offend procedural due process of law by failing to afford proper notice to an accused of the scope and nature of the proscription at issue. E.g., Connally v. General Construction Co., 269 U.S. 385, 391 (1926); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Smith v. Goguen, 415 U.S. 566 (1974). Second,

[Footnote 17 continued]
325 U.S. 91 (1945). Since there is no requirement of specific wrongful intent in the Pennsylvania statute, a doctor may be held criminally liable for a judgment that simply may have been wrong, as well as for one which is shown to have been made in bad faith. Appellants in their argument to this Court, attempt to confuse the issue by stating that if the judgment of the court below is affirmed doctors will be free to make unreasonable determinations of non-viability "cavalierly, wrongfully and without fear of consequence." Brief of the Appellants, p. 32.

vague criminal statutes deter law-abiding citizens from engaging in conduct which may be construed as falling within the coverage of the vague law. When such deterred conduct is itself constitutionally protected, the "chilling effect" of a vague proscription is deemed an unacceptable price to pay. Eg. Keyishian v. Board of Regents, 385 U.S. 589 (1967). Finally, vague criminal statutes fail to provide enforcement officials with adequate guidance concerning the precise scope of the proscribed activity, vesting such officials with excessive discretion to prosecute disfavored defendants. Eg., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). See generally, Amsterdam, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960). Pennsylvania's decision to cause potential criminal prosecution of a doctor to turn on a determination of whether a fetus "may be viable" violates all three aspects of the void-for-vagueness doctrine.

1. Section 5(a) Does Not Provide Adequate Notice of the Scope of Its Proscription

As amicus has noted, the concept of viability is itself an elusive and inexact predictive point on the biological and philosophical continuum. See, supra at 9-10. It is, however, a concept with a minimal kernel of intrinsic meaning. In contrast, the concept "may be viable" is utterly without objective meaning. See, supra, at n. 8 . What percentage of probability must a doctor project to decide, not that a fetus is viable, but that it "may be viable?" No doctor, confronted with the command of Section 5(a), can know with any reasonable degree of certainty whether a given fetus -- diagnosed as non-viable in the doctor's best medical judgment -- must, under pain of criminal prosecution, nevertheless be dealt with as a fetus which "may be viable."

In Smith v. Goguen, 415 U.S. 566 (1974), this Court invalidated a Massachusetts statute making it a crime to "treat contemptuously" the flag of the United States. In condemning the "treats contemptuously" standard, Mr.

Justice Powell, writing for the Court, noted:

> This criminal provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." [citation omitted.] Such a provision simply has no ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause. 415 U.S. at 578 [Emphasis in original].

Since the concept "may be viable" likewise provides no "comprehensible normative standard" it may not found the basis for the criminal prosecution of a doctor.[18]

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[18] Appellants' belated attempt to jettison the amorphous concept of "may be viable" by asking this Court to strike it is, of course, unavailing. Brief of Appellants, p. 43. This Court is without authority to construe away a constitutional infirmity in a state statute. E.g., Smith v. Goguen, 415 U.S. 566, 575 (1974); United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971). Moreover, appellants' request to strike the "may be viable" language from Section 5(a) is not a request for judicial construction, but for judicial re-writing. See, e.g., Welsh v. United States, 398 U.S. 333, 344 (1970) (Harlan, J. concurring).

2. Section 5(a) Impermissibly Inhibits the Exercise of Constitutionally Protected Activity

Roe v. Wade, supra, contemplates the exercise of a constitutionally protected right to a pre-viability abortion throughout the second trimester of pregnancy. To the extent the vagueness inherent in the "may be viable" standard inhibits doctors from performing late second trimester abortions because they justifiably fear entanglement in the amorphous web spun by Section 5(a), the right of a woman to obtain a second trimester abortion is seriously compromised. Since any fetus past mid-pregnancy is a candidate for coverage under the "may be viable" standard, the impact of Section 5(a) is to deter physicians from becoming involved in late second trimester abortions. Even if a physician is prepared to undertake a late second trimester abortion under the often hostile gaze of the local prosecutor, he must subordinate his medical judgment concerning viability to the directive of the statute and tailor his medical techniques accordingly, or risk criminal prosecution. The net result of the statute, therefore, is an interference with the free exercise of

medical judgment and a corresponding decline in the ability of a woman to receive the medical guidance to which she is entitled under Roe.

This Court has consistently invalidated amorphous criminal statutes which inhibit the free exercise of constitutionally protected activity. Eg. Keyishian v. Board of Regents, 385 U.S. 589 (1967). Statutes, such as Section 5(a), which require persons to speculate at their peril whether they may engage in constitutionally protected activity cast an impermissible pall upon the free exercise of constitutional rights.[19]

3. Section 5(a) Vests Local Prosecutors With Uncontrolled Discretion to Prosecute Doctors Performing Second Trimester Abortions

Since virtually all mid-pregnancy fetuses qualify as possible candidates for coverage

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19 While speculation concerning legislative motivation is always difficult [Compare Washington v. Davis, 426 U.S. 229 (1976) with United States v. O'Brien, 391 U.S. 367 (1968)], it is probable that the prime purpose of Section 5(a) is to deter doctors from performing late second trimester abortions.

under a "may be viable" standard, the effect of Section 5(a) is to render vulnerable to prosecution any physician who performs a late second trimester abortion on a fetus diagnosed by the doctor as non-viable. In order to invoke Section 5(a) against such a doctor, a prosecutor need do no more than demonstrate that the aborted fetus fell within the extremely broad range of possible, rather than actual, viability. Such an uncontrolled power, especially in the highly polarized and emotional area of abortion, is nothing less than an invitation to a local prosecutor to treat a doctor as a medical pawn in the political struggle over abortion.[20]

As Mr. Justice Powell noted in Smith v. Goguen, supra, statutes, such as Section 5(a), which vest local officials with uncontrolled discretion to invoke the criminal process against ideological opponents cannot survive

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[20] Unfortunately, the recent literature abounds with attempts by ambitious and ideologically motivated prosecutors to use the criminal prosecution of a doctor as a technique to inhibit abortion. Cf., U.S. v. Vuitch, 402 U.S. 62 (1971); Floyd v. Anders, 440 F.Supp. 535 (D. S.C. 1977) (Three-Judge Court), appeal pending, No. 77-1255 (Oct. Term 1977); Commonwealth v. Edelin, ___ Mass. ___, 359 N.E.2d 4 (1976): State v. Munson, 86 S.D. 663, [Footnote continued]

constitutional scrutiny. See also, e.g., Hynes v. Borough of Oradell, 425 U.S. 610 (1976).

4. Replacing the "May Be Viable" Standard Would Not Eliminate the Vagueness Problem.

Appellants, recognizing the hopeless vagueness of the "may be viable" standard adopted by Section 5(a), have requested this Court to re-write the statute by substituting a standard based on actual, rather than possible, viability. As amici have noted, appellants' attempt to jettison the "may be viable" standard cannot save the Pennsylvania statute at

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[Footnote 20 Continued]
201 N.W.2d 123 (1972) (directed verdict for defendant); Dr. Pablo Quiroga v. Medical Practice Bd., et al., No. 77-20461-AA (Circuit Court for County of Ingham, filed 1977). Other prosecutorial attempts have failed to result in indictments. A coroner's inquest was held in Pittsburgh during October and November 1974 to investigate a charge that Dr. Leonard Laufe, chief of obstetrics at Western Pennsylvania Hospital, had murdered an aborted fetus by allowing it to die after it survived an abortion. New York Times, October 31, 1974 at 27, col. 2. The coroner's jury concluded that the fetus had been stillborn and cleared Dr. Laufe of the charge, Id., November 8, 1974 at 45, col. 7. In June, 1974 a Minneapolis grand jury cleared the University of Minnesota Hospital and staff of the charge that fetuses which survived abortions were allowed to die.

issue in this case, since this Court lacks power to construe, much less re-write, an unconstitutional state statute. E.g.,United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971); Smith v. Goguen, 415 U.S. 566, 575 (1974). Thus, strictly speaking, no issue is raised in this case concerning the constitutionality of a statute similar to Section 5(a) predicated on the actual as opposed to the possible viability of a fetus. However, amici suggest that, given the inherent inexactitude of the predictive medical concept of viability and given the shifting and obscure factors upon which a diagnosis of viability rests, even a statute which purports to regulate medical techniques utilized in the abortion of a viable fetus would raise similar, though less extreme, issues of vagueness. Indeed, amici suggest, in the absence of a scienter requirement, any

[Footnote 20 Continued]
Minneapolis Tribune, June 5, 1971 at 1, col. 2, as cited in Sendor, Medical Responsibility for Fetal Survival Under Roe and Doe, 10 Harvard Civil Rights - Civil Liberties Law Review 444 (1975). See also Woman's Right, Physician's Judgment: Commonwealth v. Edelin and a Physician's Criminal Liability for Fetal Manslaughter 4 Women's Rights Law Reporter 97 (1978).

attempt to impose criminal sanctions on a doctor on the basis of an ex post facto finding that the "wrong" technique was used to abort an allegedly viable fetus would be doomed to failure under the vagueness doctrine. If Sheriff Screws was entitled as a matter of due process of law to require the prosecution to prove scienter when he beat his prisoner to death, surely a doctor, who performs an abortion on the good faith assumption that a fetus is not viable, is entitled to a similar protection Cf., Screws v. United States, 325 U.S. 91 (1945). Thus, in the absence of a requirement that the prosecution demonstrate a willful and intentional abortion of a fetus believed by the doctor to be viable, the state is disabled from second guessing an attending physician by subjecting him to criminal prosecution for improperly aborting a viable fetus. Commonwealth v. Edelin, supra.

II DOCTORS ARE IMMUNE FROM CRIMINAL PROSECUTION FOR EXERCISING MEDICAL JUDGMENT IN DETERMINING WHETHER AND BY WHAT TECHNIQUE, TO ABORT A FETUS

In the area of abortion, this Court has delegated to the medical profession at least two vital decisions fraught with legal implications. First, this Court has insisted that the decision as to the viability of a given fetus be made by individual attending physicians in the best exercise of their medical judgment. Planned Parenthood of Missouri v. Danforth, supra. The diagnosis of the attending physician as to viability is then permitted by this Court to trigger radically different legal consequences. Second, this Court has insisted that, even during the post-viability phase, the attending physician be permitted to abort a viable fetus when he or she determines such a procedure to be necessary to preserve the life or health of the patient. Such a post-viability diagnosis, once again, is permitted by this Court to give rise to dramatically differing legal rights and obligations. In exercising the medical skill necessary to reach a predictive judgment as to viability or a diagnostic judgment as to the threat to a patient's life or health, doctors have been directed by this Court to engage in a mixed medico-legal activity requiring the highest degree of professional skill. As with so many other difficult judgments in our society, however,

reasonable doctors may and, often, do disagree about a given prediction or diagnosis.[21] In medicine, as in law, predictive and diagnostic judgments do not lend themselves to objective determinations of right and wrong. Accordingly, if individual doctors are to be free to carry out the responsibilities placed upon them by Roe v. Wade, attending physicians must be insulated from threats of criminal prosecutions based upon an allegation that the doctor's diagnosis was wrong. Amici believe that so long as a doctor exercises medical judgment in attempting to predict viability or diagnose post-viability dangers to a patient's life or health, actions taken by a doctor in accordance with his or her medical judgment cannot found the basis of criminal liability. Whether one phrases the insulation concept as a common law

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21 Disagreements over medical judgments in the abortion area are likely to be more pronounced since the area implicates deeply felt religious and ethical values. The biological factors are difficult enough to assess without viewing them through ideological prisms.

immunity, as in Stump v. Sparkman, ___ U.S. ___, 46 U.S.L.W. 4253 (March 28, 1978); a scienter requirement, as in Screws v. United States, supra; an interference with the right of a doctor to practice his profession, cf. Planned Parenthood of Central Missouri v. Danforth, supra; United States v. Vuitch, 402 U.S. 62 (1971); or a necessary corollary of the structure established by Roe v. Wade, attending physicians must be immune to a threat of retrospective sanction arising out of a good faith exercise of medical judgment.

This Court is no stranger to the fact that it is occasionally necessary to immunize persons vested with delicate decision-making responsibilities from threat of retrospective sanction in order to assure the unhampered exercise of judgment. See generally, Barr v. Matteo, 360 U.S. 564 (1959); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949). Thus, in Stump v. Sparkman, supra, this Court ruled that a judge was absolutely immune from civil liability for issuing an ex parte sterilization order in blatant excess of his jurisdiction. If the free exercise of judicial decision-making requires the insulation of a judge from the consequences of a

wrongful sterilization order, surely the free exercise of the delicate medical judgments demanded of doctors under Roe v. Wade and Planned Parenthood v. Danforth, calls for a similar insulation from the threat of criminal liability. See also, Pierson v. Ray, 386 U.S. 547 (1967) (judicial immunity extendes to bad faith acts).

In Imbler v. Pachtman, 424 U.S. 409 (1976), this Court ruled that prosecutor was absolutely immune from civil liability for the knowing use of perjured testimony in a criminal proceeding. If the free exercise of prosecutorial decision-making requires the insulation of a prosecutor from the consequences of his knowing use of perjured testimony, surely the free exercise of the delicate medical judgments demanded of doctors under Roe v. Wade and Planned Parenthood v. Danforth, calls for a lesser insulation from a threat of criminal sanction for the good faith exercise of medical judgment.

Even in areas in which this Court has declined to recognize absolute immunity, it has recognized that individuals vested with decision-making responsibilities in uncertain areas

may not be punished for a decision which they believed, in good faith, to be correct. E.g., Butz v. Economou, ___ U.S. ___, 46 U.S.L.W. 4952 (June 29, 1978); Wood v. Strickland, 420 U.S. 308 (1975). Doctors are entitled, at a minimum, to the same qualified immunity in carrying out the judgmental responsibilities imposed upon them by this Court in the area of abortion.

CONCLUSION

Since Section 5(a) adopts a standard of criminal liability devoid of objective meaning and since doctors are entitled to a degree of immunity in carrying out their judgmental responsibilities, the decision of the District Court should be affirmed.*

Respectfully Submitted,

BURT NEUBORNE
JUDITH LEVIN
SYLVIA LAW
c/o American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

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